PRO SE APPELLANT:

WILLIE Q. POINDEXTER
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ATTORNEYS FOR APPELLEE:

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IN THE
COURT OF APPEALS OF INDIANA

WILLIE Q. POINDEXTER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0707-CR-620
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable W.T. Robinette, Master Commissioner
Cause No. 49G03-9705-CF-67369

December 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Nearly a decade after he was sentenced and three years after *Collins v. State*, Willie Q. Poindexter ("Poindexter") filed a petition for permission to file a belated notice of appeal, which the trial court denied without a hearing. Poindexter, *pro se*, now appeals the trial court's denial of his petition. Because Poindexter has failed to prove that he has been diligent in requesting permission to file a belated notice of appeal, we affirm the trial court.

Facts and Procedural History

On July 8, 1997, Poindexter and the State entered into a plea agreement whereby Poindexter agreed to plead guilty to auto theft as a Class C felony and the State agreed to dismiss a charge of resisting law enforcement as a Class A misdemeanor. Pursuant to the terms of the plea agreement, Poindexter's sentence was to be "four (4) years executed." Appellant's App. p. 17. On August 5, 1997, the trial court accepted the plea agreement and sentenced Poindexter to four years.[1]

In March 2003, Poindexter filed a *pro se* petition for post-conviction relief, in which he alleged that his trial counsel was ineffective for failing to inform him of his right to cross-examine the witnesses against him and that by pleading guilty he was giving up this right. *Id.* at 22. Poindexter did not challenge his sentence. In May 2004, Poindexter, by counsel, withdrew his petition for post-conviction relief. On April 18, 2007, Poindexter, *pro se*, filed a Verified Petition for Permission to File Belated Notice of Appeal. In his petition, Poindexter alleged that he "has been diligent in requesting

[1] It appears that Poindexter may have already served this sentence, making this appeal moot. Because the State does not argue this, we address the merits.

permission to file a belated notice of appeal because he was not even aware that he had a right to an appeal from the August 5, 1997 sentencing order until March 15, 2007." *Id.* at 35. In an affidavit attached to his petition, Poindexter averred:

> 6. I did not discover the requirement to file a petition for permission to file a belated appeal until March 15, 2007, when another offender, John Holland, gave me the decision in *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), and advised me that the decision resolved a conflict in the Court of Appeals as to whether an individual who pleads guilty to an offense in a "open plea" is entitled to challenge the sentencing imposed by means of a petition for post conviction relief.
>
> 7. That I was unable to discover sooner the right to appeal the sentencing due to the facility law liberty [sic] removing all law books and placing everything, rules, statutes, and decisions on computers.
>
> 8. That I am still unable to adequately use a computer to do legal research at this time.

Id. at 57 (Ex. C). The trial court denied Poindexter's petition the following day without a hearing on grounds that it was "not timely filed." *Id.* at 13. Poindexter, *pro se*, now appeals.

Discussion and Decision

Poindexter contends that the trial court erred in denying his petition for permission to file a belated notice of appeal. Pursuant to Indiana Post-Conviction Rule 2(1), a defendant who fails to timely perfect an appeal may file a petition for permission to file a belated notice of appeal with the trial court where "(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule." Ind. Post-Conviction Rule 2(1). The burden rests with the defendant to prove both of these requirements by a preponderance of the evidence. *Beatty v. State*, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006), *reh'g denied*. Where, as here, the trial court does not hold a hearing

on the petition, the only bases for the decision are the allegations set forth in the petition, and we will review the decision *de novo* without according the trial court's findings any deference. *Williams v. State*, 873 N.E.2d 144, 146 (Ind. Ct. App. 2007) (citing *Hull v. State*, 839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005)); *see also Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007) (observing that where the trial court does not hold a hearing before denying the defendant's petition for permission to file a belated notice of appeal, appellate courts owe no deference to the trial court's factual determinations because they were based on a paper record), *reh'g denied*.

On appeal, Poindexter argues that he is without fault and has been diligent and therefore is entitled to pursue a belated appeal pursuant to Post-Conviction Rule 2(1). Even assuming the failure to file a timely notice of appeal was not due to Poindexter's fault, he has failed to prove that he has been diligent in requesting permission to file a belated notice of appeal. Although there are no set standards of diligence, several factors are relevant, including the overall passage of time, the extent to which the defendant was aware of relevant facts, and the degree to which delays are attributable to other parties. *Moshenek*, 868 N.E.2d at 423, 424. "When the overall time stretches into decades, a belated appeal becomes particularly problematic because of the risk that significant problems will be encountered in any retrial due to unavailable evidence or witnesses or failing memories." *Id.* at 424.

Poindexter was sentenced in August 1997. Nearly six years later, in March 2003, Poindexter filed a petition for post-conviction relief, in which he did not challenge his sentence. In November 2004, our Supreme Court decided *Collins v. State*, 817 N.E.2d

230 (Ind. 2004), which determined that the proper procedure for challenging a sentence imposed following an open plea[2] is through a direct appeal. Poindexter filed his petition for permission to file a belated notice of appeal in April 2007, nearly three years after *Collins*. Our Supreme Court stated in *Moshenek* that a pre-*Collins* Post-Conviction Rule 1 challenge to a sentence can serve to establish diligence, *Moshenek*, 868 N.E.2d at 424, but Poindexter's petition for post-conviction relief, which was withdrawn, did not attack his sentence. Furthermore, Poindexter did not file his petition for permission to file a belated notice of appeal until nearly a decade after he was sentenced. Poindexter's fortuitous encounter with a fellow inmate in which he learned about *Collins* does not establish that he has been diligent in requesting permission to file a belated notice of appeal, especially considering his lack of a challenge to his sentence in the intervening decade.[3] In addition, Poindexter does not explain how the prison library's legal material being accessible only by computer has impacted his diligence. We therefore affirm the trial court's denial of Poindexter's petition for permission to file a belated notice of appeal.

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[2] On appeal, the State does not address fault and diligence. Instead, the State argues that because Poindexter was sentenced pursuant to a fixed plea, according to *Collins* he cannot challenge his sentence on direct appeal. Poindexter's plea agreement provided that his sentence was to be "four (4) years executed." Under this plea agreement, the trial court could have sentenced Poindexter to, among other things, eight years with four years suspended, resulting in a four-year executed sentence. That is, the trial court had discretion in arriving at a four-year executed sentence. Accordingly, Poindexter's plea is not fixed. *See Allen v. State*, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007) (A "fixed plea" is one that specifies the exact number of years to be imposed for sentencing). Rather, Poindexter's plea is open and therefore can be challenged on direct appeal. *See Collins*, 817 N.E.2d at 231 (noting that a plea agreement where the issue of sentencing is left to the trial court's discretion is often referred to as an "open plea").

[3] Though Poindexter makes no mention of it, the CCS reveals that on September 24, 1998, Poindexter filed a petition for modification of sentence, which the trial court denied. This petition is not in the record.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.